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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 441

ROBERT I. TOUSSIE,

Petitioner,

against

UNITED STATES OF AMERICA,

on Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF PETITIONER

MURRAY I. GURFEIN,
Attorney for Petitioner,
655 Madison Avenue,
New York, N. Y.

JACOB W. HELLER,
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit (A. 299-309) is reported at 410 F. 2d 1156. The opinion of the District Court for the Eastern District of New York (A. 37-47) is reported in part at 280 F. Supp. 473.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1969 (A. 310). The petition for a writ of certiorari was filed on August 7, 1969 and was granted on October 20, 1969 (A. 311). This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

Statutes Involved

The pertinent provisions of the Constitution (First, Fifth and Ninth Amendments), statutes (50 U.S.C. App. §§ 453, 454(a) and 462(a); 18 U.S.C. § 3282), Executive Orders (Nos. 2799 and 2942), and Selective Service Regulations (32 C.F.R. §§ 1611.7, 1613.1-16, 1642.3), are all printed in the Appendix annexed to this brief.

Questions Presented

1. Whether Congress intended the offense of failing to register for selective service to be outside the provisions of the general five-year statute of limitations (18 U.S.C. § 3282), which covers all non-capital offenses "Except as otherwise expressly provided by law."?

2. Whether the Universal Military Training and Service Act (50 U.S.C. App. §§ 451 *et seq.*) constitutionally empowers the executive branch to promulgate a regulation, that, despite Congressional silence on the subject, makes registration a continuing duty?

3. Whether a pattern of legislation has been created by the Universal Military Training and Service Act and Selective Service Regulation (32 C.F.R. § 1611.7[c]), prescribing a continuing duty to register, which compels a delinquent registrant to inculpate himself as to his initial failure to register, in violation of his rights under the Fifth Amendment as construed in *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965), *Marchetti* v. *U. S.*, 390 U. S. 39 (1968), *Grosso* v. *U. S.*, 390 U. S. 62 (1968), *Haynes* v. *U. S.*, 390 U. S. 85 (1968), and *Leary* v. *U. S.*, 395 U. S. 6 (1969)?

4. Whether a religious conscientious objector can be denied the right under the First Amendment and Fifth Amendment to have a jury pass on the sincerity of his belief that he could not register for the draft for religious reasons of conscience?

Statement of the Case

Petitioner was convicted in the United States District Court for the Eastern District of New York, upon a jury verdict, of having failed to register for the draft in violation of 50 U.S.C. App. § 462(a). He was sentenced pursuant to 18 U.S.C. § 4208(b), being committed to the custody of the Attorney General for study and report. The indictment charged in one count that the crime was committed over the course of an eight-year period from June 23, 1959 (the date of petitioner's eighteenth birthday [A. 66]) through February 3, 1967, "both dates being approximate and inclusive" (A. 5).

Petitioner admittedly never registered for the draft on his eighteenth birthday or at any time thereafter. He could not do so for reasons of conscience. Petitioner testified: "I couldn't. My conscience wouldn't permit me to. Everything I believed in wouldn't permit me to" (A. 177). It is to be noted that he reached the age of 18 in 1959—well before commencement of the Vietnamese conflict. Even absent such hostilities, however, registration was connotive of "the State—want[ing] me to become a party to killings * * *. It wanted me to become a part of the system that—that murders, and kills and—and it was against everything that I had learned, against my beliefs * * *." (A. 178)

The trial was devoted in substantial degree to presentation of petitioner's conscientious beliefs and their development, although the trial court did not permit the issue to be passed upon by the jury. It was abundantly shown on the basis of petitioner's testimony that his convictions were sincerely held, being the product of upbringing and rooted in family tradition and having been formulated and publicly announced by petitioner years before the statutorily mandated time of registration for the draft.

Petitioner and his family are Syrian Jews—a group described as extremely pacifistic (A. 160). His grandfather

left his place of birth to avoid participation in war and the maiming of others (A. 158). At home, he was submitted to family indoctrination (A. 157-158)—a preachment of "peace and non-violence and serenity and just love of people" (A. 158).

Petitioner commenced the study of pacifistic literature at the age of eleven (A. 154). He cited such writers as Einstein, Freud, Russell, Sir John Slessor, Lord Adrian, Jaubert, among others (A. 151-155), and their expressions of general abhorrence to war, which served to impress him.

Petitioner's views on the subject, fully crystallized by the *age of fourteen,* are best illustrated by his own writing at the time, admitted in evidence as Exhibit B. Petitioner had been selected as the valedictorian for his graduating class at Seth Low Junior High School in Brooklyn (A. 131-132). Significant excerpts from the speech which he prepared for that occasion were read into the record, as follows (A. 149-151):

> "So there you are and here we are, a new generation soon to occupy the center of the stage.
>
> I hope and believe that our generation has been selected by fate to play an earth-shaking role in history. Our generation is going to abolish war from the earth, just as a previous generation abolished small pox and diptheria and the present generation is abolishing polio. And we are going to abolish war, not because we are more ethical than previous generations or more moral or more intelligent, but in the words of President Eisenhower, I quote from his speech of October 19, 1954, 'Since the advent of nuclear weapons it seems clear to me that there is no longer any alternative to peace.'
>
> Let us ponder that for a moment. President Eisenhower, one of the greatest generals of all times, says 'there is no longer any alternative to peace.'
>
> War has always been brutal, vicious and cruel and immoral and destroyed in days what took years to

build. It orphaned children and blinded babies. It starved widows and burned infants alive in the cribs. But to primitive peoples, at least it made sense. You kill off your opponent and grab their lands.

But the recent past wars have become senseless. There is no longer a victor in modern war. To defeat the aggression of Japan we sacrificed the lives of hundreds of thousands of the flower of our manhood, and then we saddle ourself with the intolerable burden of rebuilding Japan and helping to support the Japanese for the rest of our lives and the lives of our children and the lives of our grandchildren.

And still our conscience continues to torture us, so a few weeks ago we bring twenty-five girls who have been disfigured by the atom bomb and Hiroshima. We bring them to New York for plastic surgery. Yes, forget the cruelty. Wars have been senseless for many years. And now with the advent of the H bomb, wars threaten the human race with extinction. If any disease—say pneumonia or scarlet fever were suddenly to take such a virulent form, as to threaten the human race with extinction, a way would be found to conquer it.

And now that war has taken such a virulent form, we are going to find a way to conquer it.

As General Douglas MacArthur told the American Legion in his speech on January 26th of this year, and I quote, 'The next great advance in the evolution of civilization cannot take place until war is abolished.'

Some may say, 'Oh, man has always been an aggressive creature and there'll always be wars.'

I say, 'Yes, there'll always be wars.' There's the war against cancer. There's the war against injustice everywhere. There's the war against bitter poverty that makes fully two-thirds of the population hungry for bread right now. There's the war against heart disease, and there's that beautiful, wonderful war

> against bigotry. I hope to live a hundred years and to take part in those wars until the day I die."

These views caused petitioner to forfeit the honor of delivering the valedictory address, however. His speech was rejected by the teacher in charge, and he refused to alter its text or his opinions, as reflected therein (A. 147).

It appeared that petitioner had not joined any conscientious objector organizations. This entire matter was intensely personal to him—just between "his conscience and the Almighty" (A. 157). He explained that his beliefs would not permit him to be party to anything touching on the destruction of human lives. These laws of God, to him, came first, above the laws of country (A. 157, 180). To quote petitioner (A. 160):

> "I love my country. It's just—I can't have anything to do with—I can't be a part of anything that has to do with the destruction of human life or of other people's rights or somebody else's family, somebody else's child."

Petitioner further testified that, in his view, the act of registration was an inextricable part of the military process. He believed that registration constituted acquiescence therein and he could not bring himself to do so (A. 155-156, 242).

The evidence also showed that these views of petitioner coalesced with factors of an emotional and psychological nature to prevent him from registering. Medical and psychiatric testimony was offered and it was urged on the basis thereof that petitioner also lacked capacity to formulate the requisite criminal intent for commission of the crime charged. In this connection Drs. Dunkell (A. 113-122, 185-214) and Baruch (A. 165-173) testified on petitioner's behalf and Dr. Falsey, who rendered inconsistent views, testified for the Government (A. 252-265).

Petitioner moved before trial to dismiss the indictment on the grounds that it was time-barred under the five-year general limitation provision of 18 U.S.C. § 3282 and constitutionally defectiv in violation of the Fifth Amendment (A. 6-36). The District Court (Dooling, J.) prior to the decisions by this Court in *Marchetti, Grosso* and *Haynes,* denied the motion. The said motions were renewed during the course of trial and, together with the other relevant motions made on petitioner's behalf, were also denied (Mishler, J.).

A companion motion to dismiss an indictment involving petitioner's brother was simultaneously made and granted by Judge Dooling on the ground that the said prosecution was time-barred because the brother had been twenty-six years old for more than five years (A. 38-40). The Government took a direct appeal to this Court from the said order of dismissal. On review by the Solicitor General, however, that appeal was withdrawn.

Summary of Argument

I

We urge that the five-year general statute of limitations (18 U.S.C. § 3282) commenced running on petitioner's eighteenth birthday and bars the instant prosecution. This result is dictated by the plain language of the general limitation statute and the relevant provisions of the Universal Military Training and Service Act, which has no separate or different limitations period. The Court below, without a statutory basis, relied upon a selective service regulation (32 C.F.R. § 1611.7[c]), imposing a "continuing duty" to register beyond age eighteen; thus, "for all practical purposes" (A. 302) extending the five-year statute. It permitted a regulation of the Executive branch to extend the scope of a crime beyond the limits of its statutory definition and to render the legislatively prescribed limitation period meaningless. It also permitted the exception

"by law" in the general statute of limitations (18 U.S.C. § 3282) to mean a regulation (32 C.F.R. § 1611.7[c]) rather than its historic connotation of a statute. The exception provision of the general statute of limitations must be strictly construed. The Congressional exceptions in this area have been by legislative enactment.

The regulation, as construed, permits an unconstitutional usurpation by the Executive of legislative prerogatives. The timeliness of a prosecution is an essential element of the offense. There is no evidence of a legislative intent to treat offenses under the draft law different from other offenses covered by the general statute of limitations.

The sole exception to the foregoing—which lends substantial support to our position—may be found in the 1967 amendment (81 Stat. 100) to 50 U.S.C. § 454 (the provision of the Draft Law pertaining to *induction* and service in the armed forces—as distinguished from § 453, here at issue, which deals with registration). Congress there expressly contemplated a continuing duty by providing that any registrant who failed or refused to report for induction "shall continue to remain liable for induction • • •." This expression of legislative intent is especially significant when contrasted with the total absence of a like legislative direction with respect to registration under § 453.

The Court below, while adopting the continuing duty theory as to registration, held that the duty to do so, and hence the crime, continued only to age 26. This theory, too, is without warrant in the statute and represents an untenable compromise.

The force of petitioner's contentions on the statute of limitation issue and the difficulties inherent in the statutory scheme, led the Court below to conclude that

> "It may be that application of the statute of limitations to this area deserves particularized congressional attention, with a statute, rather than regulations, stating the applicable limitation periods." (A. 304)

We contend that Congress has already passed such a statute (18 U.S.C. § 3282), which there is no valid reason to ignore. In any event, the statute and proclamation clearly prescribe a duty to register *on the day* the registrant attains his eighteenth birthday or within five days thereafter.

II

If the offense is not construed to be a continuing one, the constitutional question hereinbelow presented need not be decided. The continuing duty theory, however, runs afoul of the Fifth Amendment. We maintain that if the statute and regulation imposed upon the petitioner a continuing *duty* to register, despite his initial failure to register at age eighteen, such compulsion to register thereafter compels self-incrimination in violation of the Fifth Amendment. For the registration itself would expose the delinquent registrant to prosecution for his failure to register on time. Application of the Fifth Amendment is mandated under the decisions of this Court in *Albertson, Marchetti, Grosso, Haynes and Leary, supra.* All relevant tests propounded by those decisions have been satisfied here. In particular, since registration in accordance with the regulations could not be accomplished without divulgence by the registrant of his date of birth, among other things, a "real and appreciable" hazard of incrimination as to the prior failure to register (which would be automatically divulged thereby) is created.

By means of the continuing duty theory a strange concept has been introduced to Federal criminal jurisprudence which should not be permitted to stand. A continuing crime has been fashioned where the defendant must *confess* guilt in order to terminate its continuance and start the statute of limitations running. Such a requirement is inimical to the Fifth Amendment and subversive of the legislative policy reflected in statutes of limitation.

III

The final issue presented relates to the First Amendment and its application to one's conscientious beliefs.

1. We maintain that consistent with this Court's decisions in *Girouard* v. *U. S.*, 328 U. S. 61 (1946) and *Sherbert* v. *Verner*, 374 U. S. 398 (1963), a defendant is constitutionally entitled to have the jury pass upon the sincerity of his conscientious beliefs and to acquit if it finds that the failure to register was a result thereof. *U. S.* v. *Nugent*, 346 U. S. 1. (1953), relied upon by the Court below (A. 308), did not treat with the issue. The trial judge refused to submit this question to the jury.

Conscientious objection as a constitutional right is not foreclosed by history. Under the test of *Sherbert* v. *Verner*, *supra*, the Government cannot meet the stringent test of demonstrating that there are no alternatives to infringing First Amendment rights in Selective Service. On a balancing of interests, the rights of a relatively few conscientious dissenters to the process of registration should be respected because of the infinitesimal effect of their dissent upon the process of raising an army. The only forum available to vindicate the constitutional right is the Federal Court in the criminal prosecution.

2. Even if the right of a conscientious objector to exemption is not a constitutional right, in the full sense, discriminatory action toward a privilege within the area of the "free exercise" clause of the First Amendment is unconstitutional (*Speiser* v. *Randall*, 357 U. S. 513 [1958]). This Court has extended prohibitions against discrimination to the due process clause of the Fifth Amendment (*Bolling* v. *Sharpe*, 347 U. S. 497, 499 [1954]; *Schneider* v. *Rusk*, 377 U. S. 163, 168 [1964]; *Shapiro* v. *Thompson*, 394 U. S. 618, 641-2 [1969]).

Even though the Court in *Sherbert* v. *Verner*, *supra*, did not specifically pass on the "equal protection" argument

under the Fourteenth Amendment, it found the fact of discrimination to be relevant in assessing a "free exercise" privilege under the First Amendment (374 U. S. at p. 406).

To permit judicial review of the sincerity of one's conscientious beliefs when one has registered and to deny any judicial determination whatever to one who does not register *as a matter of conscience* is to discriminate between two types of conscientious objectors, equally sincere. Such discrimination is violative of the First Amendment as well as the Fifth Amendment.

ARGUMENT

POINT I

The offense charged was time-barred by the five year limitation period prescribed by 18 U.S.C. § 3282; any other construction is constitutionally invalid as an executive usurpation of legislative power.

A. The five year general statute of limitations (18 U.S.C. § 3282) governs the case at bar.

The relevant statutory provisions giving rise to the crime here charged are 50 U.S.C. App. § 453 (establishing the duty to register) and § 462 (prescribing penalties for violation of the act). Presidential Proclamations No. 2799 and No. 2942 set forth the specific dates for registration, providing in respect of petitioner that he register on his eighteenth birthday or within five days thereafter (Pres. Proc. No. 2799 subd. [j]).

The general statute of limitations (18 U.S.C. § 3282) provides that a person may not be prosecuted, tried or punished for an offense unless indicted within five years next after its commission "Except as otherwise expressly provided by law."

The Universal Military Training and Service Act does not "otherwise" provide a separate and different statute of limitations.

The Courts below avoided the five-year limitation period by holding that the offense was a continuing one, in reliance, not upon the statute, but upon a Selective Service regulation (32 C.F.R. § 1611.7[c]), which provided that "(c) The duty • • • to present himself for and submit to registration *shall continue at all times* • • •" (emphasis supplied).

The Court of Appeals frankly conceded that "the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term" (A. 302). It recognized that the continuous offense doctrine was not mandated by the statute, but by the *regulation*. Despite this the Court held the indictment not to be time-barred on two grounds:

First. That the five-year statute *is* being recognized, but that it does not begin to run when the crime is completed because the regulation prescribes a continuing duty; and

Second. That if the five-year statute is in fact deemed extended, it is because the continuing duty regulation is an express provision of "law" (A. 303-304).

It expressly held, moreover, that the regulation is not outside the Congressional grant of power (A. 302-303).

We respectfully contend that the Court erred in all of its alternative formulations.

(*i*) *The Court's concession that "for all practical purposes"* (A. 302) *the general five-year statute of limitations has, indeed, been extended is more cogent than its lip service to the five-year statute and its conclusion that the issue is merely when that statute begins to run.*

There is no expression of Congressional policy to indicate a desire by Congress to have a different statute of limitations apply to failure to register for the draft than to other crimes. Where Congress intended to impose a continuing duty with respect to selective service, it knew how to say so.

Unlike § 453, § 454 does contain a continuing duty provision. Thus, § 454(a) provides that any registrant who has failed or refused to report for induction "*shall continue to remain liable for induction* and when available shall be immediately inducted" (emphasis supplied). The difference in treatment in the two sections is significant (See *McKart* v. *U. S.*, 395 U. S. 185, 191 [1969]).*

In further contrast to the statute at bar, we refer, for illustrative purposes, to the offense of concealment of a bankrupt's assets under 18 U.S.C. § 3284. Congress there expressly provided that such offense shall "be deemed to be a continuing offense" until the debtor is discharged or a discharge is refused; and that the period of limitations "shall not begin to run" until such time. In the absence of statute, the crime had been held not to be a continuing offense (*Warren* v. *U. S.*, 199 Fed. 753 [5th Cir. 1912]).

(ii) The exception provision of the general statute of limitations must be strictly construed.

As Mr. Justice Douglas said for the Court in *Pendergast* v. *U. S.*, 317 U. S. 412, 418 (1943):

> "Statutes of limitations normally begin to run when the crime is complete. See *U. S.* v. *Irvine*, 98 U. S. 450. Every statute of limitations, of course, may permit a rogue to escape. Yet, as Chief J. Marshall ob-

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* The Court in *McKart, supra,* said:

"The *section* says nothing about the continuing existence of a family unit, even though other provisions of the Selective Service laws make similar conditions explicit in other contexts." (Emphasis supplied.)

> served in *Adams* v. *Woods, supra* [2 Cranch 336] 342 'not even treason can be prosecuted after a lapse of three years.' That was still true at the time of this offense. See R. S. § 1043, 18 U.S.C. § 581."

Any exception to a general statute of limitations "is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose. (*U. S.* v. *Dickson*, 15 Pet. 141, 165; *Ryan* v. *Carter*, 93 U. S. 78, 83." (*U. S.* v. *McElvain*, 272 U. S. 633, 639 [1926].)

As this Court said in *U. S.* v. *Scharton*, 285 U. S. 518 (1932), at pp. 521-522:

> "Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. *United States* v. *McElvain*, 272 U. S. 633, 639. And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses."

See also, *Bridges* v. *U. S.*, 346 U. S. 209, 215-216 (1953).

As recently as last term, the Court reiterated "the principle that criminal limitation statutes are to 'be liberally interpreted in favor of repose. *U. S.* v. *Scharton*, 285 U. S. 518, 522 (1932)'." (*U. S.* v. *Habig*, 390 U. S. 222, 227 [1968].)

Various attempts to extend general statutes of limitation by ingenious argument have been rebuffed by this Court. Thus, the prosecution theory that a subsidiary conspiracy to conceal the crime tolled the statute of limitations on conspiracy was rejected (*Grunewald* v. *U. S.*, 353 U. S. 391 [1957]; *Krulewitch* v. *U. S.*, 336 U. S. 440 [1949]). In *Fiswick* v. *U. S.*, 329 U. S. 211 (1946), the unanimous Court held that the last overt act of the conspiracy was the filing by one of the defendants of a registration statement under

the Alien Registration Act of 1940 in which he falsely failed to disclose his connection with the Nazi party. In *Pendergast* v. *U. S., supra,* the Court rejected the Government's argument that the statute did not begin to run from the time when the contempt of court was actually committed.

ALI Model Penal Code, Tentative Draft No. 5 § 1.07(4), criticizes the "continuous offense" doctrine in Selective Service registration cases, stating that "the continuous offense exemption too freely applied is inconsistent with the purpose of time limitations," citing as an example *Fogel* v. *U. S.,* 162 F. 2d 54 (1947), the original 5th Circuit opinion enunciating the "continuous offense" doctrine in a failure to register for the draft case (Comment, p. 23).

Congress itself seems to dislike the continuous duty doctrine where it involves a failure to file. For example, failure to file an income tax return would seem to be a perfect case for the application of the "continuous offense" doctrine, for the defendant there has never fulfilled his duty to file. Yet Congress has clearly stated its policy that the statute of limitations begins to run on the very day on which the return should have been filed, and is not tolled by the theory of continuing duty (26 U.S.C. §§ 6531, 6513).

(*iii*) *Congress has, in particular cases, by contrast, specifically provided "by law" for periods of limitation different from the period of five years prescribed in the general statute* (*18 U.S.C. § 3282*).

Thus, violations of the statutes against "gathering, transmitting or losing defense information" (18 U.S.C. § 793), for "gathering or delivering defense information to aid a foreign government" (18 U.S.C. § 794), and harboring persons suspected of such acts (18 U.S.C. § 791), prescribe a *ten* year statute of limitations for future offenses, other than capital offenses (Act, September 23, 1950, c. 1024, § 19, 64 Stat. 1005; see note to 18 U.S.C.

§ 792). Similarly, frauds relating to nationality, citizenship and passports are under a *ten* year statute of limitations (18 U.S.C. § 3291). The offense of conspiring to establish a totalitarian dictatorship also has a *ten* year statute of limitations (50 U.S.C. § 793[e]).

These illustrations compel the conclusion that when Congress, as a matter of policy in cases gravely affecting national security, desires to extend the general statute of limitations, it does so by the *enactment,* in pursuance of its powers under Article I, of a special statute.

The statutory illustrations given further demonstrate the dangers of making policy decisions under the guise of interpretation.

For the upshot is that for "all practical purposes" (A. 304), while the statute of limitations for treasonable activities is ten years, the period of limitations for a youth of eighteen years who fails to register is at least *thirteen* years (18 to 26 years—8 years, plus 5 year statute of limitation=13 years). Under the decision below, the statute would not run on an eighteen year old who fails to register until he is five days past his *thirty-first* birthday. Under the doctrine of other circuits it may never run (See, *e. g. McGregor* v. *U. S.,* 206 F. 2d 583 [4th Cir. 1953]; *Gara* v. *U. S.,* 178 F. 2d 38, 40 [6th Cir.], *aff'd.* 340 U. S. 857 [1950]).

So far reaching a deviation from the normal Congressional policy regarding statutes of repose demands an unequivocal expression of the Congressional will—by the enactment of a special statute. Anything less should be viewed as a determination of policy by the executive or the judicial branches of the Government. The history and spirit of our institutions—indeed, the very basis of our constitutional separation of powers—is repugnant to such a result.

(iv) The enunciation of a continuing offense theory, moreover, poses hard questions which the Court of Appeals

frankly recognized as "problems lurking in the background" (A. 304).*

It is no answer for the Court of Appeals to elide the question on the ground that a particular indictment "charged only one offense—wilful failure to register over a lengthy period of time—and appellant never did register" (A. 304). Even if the "continuing duty" theory did convert the failure to register into a single offense, the question still remains when that offense was committed or completed. Could a registrant defeat an indictment by claiming that he still had time to register at any time up to age 26? Such a contention would be absurd. But its very absurdity shows that the crime was completed and indictable when the petitioner failed to register on attaining the age of eighteen years. And there is no statute evidencing a Congressional intent that the ordinary consequences—the running of the general five-year statute of limitations *from that time*—should not follow.

The continuing offense theory, aside from having no statutory warrant, logically makes prosecution possible without any limitation whatever. Thus, under the wording of the regulation, a person seventy years old can be prosecuted for having failed to register fifty-two years before at the age of eighteen.

In addition to the formulations by the Court of Appeals of "problems lurking in the background," there is also the obvious question of double jeopardy.

The continuous offense theory of the Court of Appeals raises involved questions of double jeopardy, which are

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* All of these problems are integrally related to the question of Congressional intent. Thus, as the Court below noted, "is each day of failure to register a separate offense, for which a prosecution can be brought?"; "Can the knowing and wilful failure to register when the duty first attaches be legally cured by a subsequent tardy registration?"; "are there other continuing duties under the selective service system that are not cut off at age 26, and, if so, when, if ever, does the statute of limitations run as to them?" (A. 304).

inescapable. If a defendant (like Toussie) fails to register, is convicted and receives a jail sentence which he has served by the time he is twenty-two years old, would he still be under a *duty* to register, under the theory of the Court below, when he gets out of jail? If he then fails to register, could the Government prosecute him again on the theory that his jail sentence gave him no absolution from his "duty" and hence, indict him once more? Even though Toussie may have been indicted on the theory of a single offense in this particular indictment, there is no escaping the dilemma that a continuing duty theory imposes on the issue of double jeopardy. (See *e.g., U. S.* v. *Bendik*, 220 F. 2d 249 [2d Cir. 1955]).

This, too, can be avoided by the construction we urge, namely, that there is no continuing duty, but that the duty has been breached by a failure to register upon the attainment of age eighteen.

(v) The statute and proclamation itself make it clear that the duty to register pertaining to this case was a duty to register when the petitioner attained his eighteenth birthday and five days thereafter.

Contrary to the regulations, the statute and proclamations do prescribe specific dates *and not a period of years* for accomplishment of the registration. With respect to persons who were not yet eighteen years old at the time the statute took effect (like petitioner) Presidential Proclamation No. 2799, subd. (j) of paragraph 1, simply provides that "Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter." Presidential Proclamation No. 2942 issued in 1951 makes similar provision.

It is thus evident that a person is given only one time to register. With respect to those reaching the age of eighteen years *after* the effective date of the statute (like

petitioner), that one specific time is when he reaches the age of eighteen years and five days.

We submit that if a person fails to register on the prescribed date or within the five-day period thereafter, as above set forth, the breach of duty occurs *then and there.* There is nothing in the statute which says that the breach of duty to register continues for eight years before the statute begins to run, as the Court below found.*

B. The Regulations as construed are an unconstitutional invasion of legislative power.

To the extent that the regulations import a concept of duty to register beyond the dates prescribed by the statute, the breach of which gives rise to criminal culpability, we submit that an unconstitutional usurpation of legislative authority has been effected.

The argument of the Court of Appeals, in this respect also, we respectfully submit, is untenable. Historically an

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* It is true, as the Court of Appeals noted in its opinion (A. 301-302), that the prior decisions on the subject have held that a continuing duty to register obtains, which serves to preclude application of the statute of limitations (*Fogel* v. *U. S.*, 162 F. 2d 54 [5th Cir.], cert. denied, 332 U. S. 791 [1947]; *McGregor* v. *U. S.*, 206 F. 2d 583 [4th Cir. 1953]; *Gara* v. *U. S.*, 178 F. 2d 38, 40 [6th Cir. 1949], affd. 340 U. S. 857 [1950]; Cf. *U. S.* v. *Guertler*, 147 F. 2d 796 [2d Cir. 1945]). But it does not appear that the constitutional question was raised.

Indeed, a conflict exists even between those cases and the decision of the Court of Appeals below. In *McGregor* and *Gara, supra,* the continuing duty imposed was deemed to be open-ended with no time limitation whatever. The Court of Appeals in this case recognized that such logical extension of the holdings in those cases was "unfair and absurd" (A. 303). It, therefore, imposed a cutoff date at age 26. A conflict of interpretation, therefore, now exists between the Second Circuit in this case and the Fourth and Sixth Circuits in the *McGregor* and *Gara* cases. *Gara* reached this Court. It was affirmed, however, by an equally divided Court. Resolution of the issue is, therefore, a matter of first impression for this Court.

extension of a statute of limitations is a legislative, not an executive function.*

The common understanding of the Bar is expressed in ALI Model Penal Code, Tentative Draft No. 5, § 1.07(4):

> "An offense is committed either when every element occurs, or, if a *legislative* purpose to prohibit a continued course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed." (Emphasis supplied)

The American Law Institute there comments, p. 23:

> "The draft in effect provides a presumption against a finding that an offense is a continuing one for purposes of time limitation."

When Congress used the phrase "Except as otherwise expressly provided by law," it meant by statute, not executive order. The enactment of statutes of limitation is so exclusively within the legislative sphere that it would strain language to hold that Congress intended so serious

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* The very phrase "statute" of limitations connotes legislative action. An early statute of limitations in England was created by Parliament, not the King. (The Treason Act, 1695 [7 and 8, Will. IIIc. 3]; 9 Halsbury Statutes of England 82).

The first criminal statute of limitations after the adoption of the Constitution was by Act of April 30, 1790, Ch. 9 § 32, 1 Stat. 119 (See 18 U.S.C. § 581-3).

In the Colonies before the Revolution limitations for prosecution of crime were by the Colonial legislatures (see 102 Univ. of Pa. L. Rev. 630, 631 [1954], citing Whitmore, Colonial Laws of Mass. 163 [1889]; Charter and Laws of the Province of Pa. 1682-1700 [173-4] (George, Neod and McComant [1879]).

As early as 1684 there was a 6 months limitation on offenses against the Government, but the limitation was created *by statute.* (See also Howe, Readings in American Legal History 19 [1949], Radin, Anglo-American Legal History § 79 [1936].)

a departure from the clear historic meaning of "law" in this context.*

As the regulation was construed below, it is unconstitutional as an executive usurpation of well-defined historical legislative power. Only Congress can extend or provide for the tolling of its own statutes. While it is perhaps fashionable these days to fudge the separation of powers as constitutional doctrine, the rule is firmly embedded in our constitutional tradition that the executive may not legislate as such (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 [1935]; *A.L.A. Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495 [1935]; *Youngstown* v. *Sawyer*, 343 U. S. 579 [1952]; see *Leary* v. *U. S. supra*, 395 U. S. 6, 24 [1969]).

Youngstown v. *Sawyer*, permitted the majority to state their views on the constitutional doctrine of separation of powers in historic language.

Mr. Justice Black, for the Court, wrote:

> "In the framework of our constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a law-maker." (at p. 587)
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> "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes of freedom

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*We urge that "by law" means by "statute" historically. This is supported by Reviser's Note to 18 U.S.C. § 3282 which says: "Section 582 of Title 18, U.S.C. 1940 ed. and Section 746(g) of Title 8, U.S.C. 1940 ed., Aliens and Nationality, were consolidated. 'Except as otherwise expressly provided by law' was inserted to avoid *enumeration* of exceptive provisions" (emphasis supplied). This obviously meant statutory provisions.

Moreover, the phrase "required by law or regulations" is commonly used to distinguish between a *statute* and a regulation. See e.g. 26 U.S.C. § 6531.

> that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand." (at p. 589)

Mr. Justice Douglas, concurring in *Youngstown* said:

> "We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places not *some* legislative power in the Congress; Article I, Section 1 says 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'" (at p. 630)

As Mr. Justice Brandeis had earlier written in his dissent in *Meyers* v. *U. S.*, 272 U. S. 52, 293 (1926):

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."

In the absence of a special statute, the general statute of limitations creates a *jurisdictional* fact which the prosecution must prove. A plea to the statute of limitations is a plea to the merits (*U. S.* v. *Barber*, 219 U. S. 72, 78 [1911]). Such a plea affects his liability [the defendant's] "as matter of substantive law" (Holmes J. in *U. S.* v. *Oppenheimer*, 242 U. S. 85, 87 [1916]; see also *People* v. *Hines*, 284 N. Y. 93 [1940]).

Timeliness is an *essential element* of a crime (See *Flemister* v. *U. S.*, 260 F. 2d 513 [5th Cir. 1958]; *White* v. *U. S.*, 216 F. 2d 1 [5th Cir. 1954]). We believe there is no precedent for the promulgation of an essential jurisdictional element of a crime by the Executive branch.

If, as Mr. Justice Holmes said, the question of whether a prosecution is time-barred is a "matter of substantive law" (242 U. S. at p. 87), then the only branch of govern-

ment constitutionally able to legislate that substantive law is Congress itself. If the period prescribed by Congress has, indeed, passed, then the statute of limitations has run and the plea in bar is an assertion that there is no longer a prosecutable crime, for one of its elements, timeliness, is gone.

Accordingly, no matter from what aspect the statute of limitations is viewed, historically, by Congressional intention, or as practical matter, its exclusive source must be Congress alone in which is vested all legislative power.

It is constitutionally forbidden for the Executive branch to create a continuing offense without a specific mandate from Congress. History, as we have seen, *supra,* shows a number of continuing offenses created by Congress itself. We know of no such history for the Executive branch.

The suggestion that the Executive branch had the right to create a continuing offense under the Universal Military Training and Service Act is like saying that the Commissioner of Internal Revenue has the right to prescribe by regulation that a failure to file an income tax return is a continuing offense. It would be for Congress and Congress alone to make such a determination.

The Court below assumed, moreover, that the statutory language presumably showed an intention on the part of Congress to permit the President to make the duty to register a continuing duty. It relied upon the language giving the President power to fix the time or times and place or places for registration (A. 302; 50 U.S.C. App. §453).

We submit that a close reading of the statute (50 U.S.C. App. §453) indicates that the reference to "such" time or times or place or places indicates that it is in apposition to the first and each subsequent registration proclaimed by the President. When Congress said *at* such time or times and place or places, it meant specific days and time of day. The requirement is that he register *on* the day or days

fixed for the first or any subsequent registration and that he must present himself at such time or times or place or places. This construction is fortified by the circumstance that Congress has specifically provided for a *continuing* liability for induction (18 U.S.C. § 454[a]), although it did not do so for registration.*

POINT II

The fifth amendment precludes application of the continuing duty theory to the act of registration.

If the Court holds the instant prosecution to have been time-barred, no constitutional question is reached. The statute should be so construed, if possible, as to avoid constitutional doubts (*Crowell* v. *Benson*, 285 U. S. 22, 62 [1932]; *U. S.* v. *Rumely*, 345 U. S. 41, 45 [1953]). If the Court accepts the continuing duty theory to toll the statute of limitations, a serious constitutional question, in our respectful submission, does arise. Either the statute of limitations should be so construed as to avoid constitutional doubt or its application herein should be stricken as violative of the petitioner's rights under the Fifth Amendment.

The Courts below held that the Selective Service Regulation (32 C.F.R. § 1611.7[e]) (App. to Brief p. 13) imposed a "continuing duty" to register on a delinquent who had initially failed to register at age eighteen.

Our position may be stated as follows: If it is held that one has a continuing *duty* to register, under penalty of criminal sanction, registration at any time after the date first required therefor is tantamount to compelling an admission of criminal culpability for prior failure to register.

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* The regulations even provide that "All persons waiting to register at any place of registration at the closing hour on the day or *the last one of the days fixed* for their registration by the Presidential proclamation shall be registered." (32 C.F.R. § 1613.1[b]; emphasis supplied) (App. to Brief, p. 14.)

Registration cannot be compelled under penalty of criminal sanction at any time after the date first prescribed therefor; otherwise one is being required to confess guilt in violation of Fifth Amendment guarantees (*Albertson* v. *Subversive Activities Control Board, supra; Marchetti* v. *U. S., supra; Grosso* v. *U. S., supra; Haynes* v. *U. S., supra; Leary* v. *U. S., supra.*)

If there is a continuing duty to register, it is not accompanied by a statutory immunity from prosecution for a late registration. The duty to register, after the date of initial registration has passed, is still compulsory, but the very act of compliance renders the late registrant subject to criminal prosecution. This is compulsory self-incrimination in its simplest form.

It is as if there were two registration statutes: (1) a statute requiring registration on the first day; and (2) a statute requiring registration thereafter with a provision that compliance under the second statute renders the registrant subject to prosecution under the first statute. Even though the duty may continue, there is no doubt that a wilful failure to register when first required to do so had already made a completed crime. That being so, subsequent registration itself may be tantamount to a confession—and a confession compelled by the continuing duty theory. The continuing duty regulation requires him in the course of late registration "to identify himself" as a person who had not registered on time (see *Leary* v. *U. S., supra,* 395 U. S. 6, 16). The failure to provide for a statutory immunity coextensive with the constitutional privilege makes him as vulnerable to prosecution as the Communist party member, the gambler, or the marijuana possessor.*

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* (See also *U. S.* v. *Rosenson,* 291 F. Supp. 874, 876 [E. D. La. 1968] for application of this Court's decisions to a prosecution for failure to surrender, upon re-entry, a certificate evidencing a prior registration, required to have been obtained before leaving the United States.)

The standard emerging from this Court's decisions for application of the Fifth Amendment is the "substantiality of the risks of incrimination" which confront the claimant. (See e.g., *Marchetti* v. *U. S.*, 370 U. S. at p. 54). If the hazards created are "real and appreciable," application of the Fifth Amendment is required (*Haynes* v. *U. S.*, 390 U. S. at p. 97). These tests were deemed satisfied in *Marchetti,* the Court observing that under the registration provisions there involved, the defendant "was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in the chain' of evidence tending to establish his guilt" (390 U. S. at p. 48).

Similarly, in *Haynes,* the prospective registrant could reasonably fear that the possession established by his registration would facilitate his prosecution under the making and transfer clauses of § 5851; and that the information required to be furnished under the registration statute was "likely to facilitate their arrest and eventual conviction."

The regulatory scheme involved in the case at bar as construed by the Courts below utterly fails to provide a means for one who had previously failed to register to register subsequently without requiring him to sign a confession of guilt. This is far more than the mere "facilitat[ion]" of "his prosecution" (*Haynes* v. *U. S., supra*), sufficient to require application of the Fifth Amendment.

Albertson, supra, teaches that where the questions on the forms to be filled out involve risk of incrimination even under the same Act (there § 4(a) of the Subversive Activities Control Act, 64 Stat. 991, 50 U.S.C. § 783[a]), such requirement is inconsistent with the protection of the self-incrimination clause (382 U. S. at pp. 76-78). *Haynes, supra,* also involved incrimination under the same Act (390 U. S. at pp. 97-99).

We, therefore, refer to the applicable regulations in Title 32 C.F.R. § 1613.1—16 (App. to Brief, pp. 14-18). It is first provided in § 1613.11(a) that "every registrant before being registered shall enter his name and place of residence upon one of the numbered lines on the Tally Sheet" and "shall be registered on a Registration Card (SSS Form No. 1)." Among the more significant items which must be included on the form, which the registrant is required to divulge (and its accuracy ensured by the registrar), is the registrant's *date of birth* (§ 1613.12[c]).

The context of the foregoing procedures is one of compulsion, in its entirety, by direct mandate of the statute and the regulations. Section 1613.16 of the regulations, as well as § 462 of the Act, contemplate stiff penalties (5 years) for failure to divulge the information. Immediate referral of the matter to the United States Attorney is also mandated by the regulations. "Persons attempting to obstruct or delay" registration, the regulations further provide "should be dealt with promptly and firmly" (32 C.F.R. § 1613.16).

Section 1642.3 (App. to Brief, p. 18), provides that compliance by the draft board with procedures concerning delinquency (i.e., warnings to registrants) is *not* a condition precedent to prosecution under Title 1, § 12 of the Military Selective Service Act of 1967 (50 U.S.C. App. § 462).

The only way a registrant could terminate his "continuing duty" would be to incriminate himself by late registration. In other so-called "continuing offenses" like conspiracy, the defendant does not have to perform an act of self-incrimination in order to abandon the conspiracy. Under the reasoning of the Court below there is no way to abandon the "continuing offense" except by the act of registering—an act of compulsory self-incrimination.

The reasoning of the Court of Appeals, distinguishing the *Albertson, Marchetti, Grosso* and *Haynes* decisions, is that "his (petitioner's) inaction did not give rise to the

threat of punishment beyond that he had already risked" (A. 307). The distinction is invalid. The Fifth Amendment does not deal with punishment, but with *evidentiary* self-incrimination.

The constitutional test, we submit, is not whether additional punishment is provided but whether the statute, as construed, requires the individual to perform an act which is self-incriminatory. Analysis will be furthered by treating the draft registration statutes as two statutes as previously discussed, *supra*, p. 25.

The Communist or gambler at least gets absolution from prosecution under the registration statute by registering; the man who registers late for the draft, as his duty was construed below, does not. He has merely begun the process of convicting himself.

These views have been re-emphasized by the Court in the recent *Leary* decision, as follows (395 U. S. at p. 18):

> "Since compliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination."

So, too, in contrasting the right of an accused under the Fifth Amendment to remain silent at his trial, the Court in *Leary* aptly characterized the aspect of the privilege here involved as "the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act" (395 U. S. at p. 28).

The Court below conceded that it is, indeed, "arguable" that the continuing duty regulation "is directed at a 'selective group inherently suspect of criminal activities' *Albertson* v. *Subversive Activities Control Board*, *supra*, 382 U. S. at 79" (A. 305-306). The group who failed

to register at eighteen is a "selective group inherently suspect of criminal activities". It is well-known that there are many young men in this group who are colloquially known as "draft resisters". It is to this group that the regulation addresses itself with a continuing duty.

Whether Congress had as its "purpose" entrapment of young draft resisters is irrelevant. *Albertson* and the line of cases following it cannot be distinguished upon the ground that in those cases it had been the Congressional purpose to strike at a particular group. The constitutional test is not the purpose of Congress, but whether, as objective fact, the particular group was struck. The Court made this clear in *U. S.* v. *O'Brien,* 391 U. S. 367, 383 (1968). The Court there rejected the conception that the "purpose" of Congress was at issue in constitutional adjudication, citing *McCray* v. *U. S.,* 195 U. S. 27, 56 (1904) and *Arizona* v. *California,* 283 U. S. 423, 455 (1931). In the light of the long history of this constitutional doctrine, it is difficult to say that this Court in *Albertson* and the line of cases succeeding *Albertson* based its constitutional adjudications on some unlawful "purpose" of Congress. It is the impact on the individual that made the statutes unconstitutional.

The Court below proceeded to reason, however, that "many initial failures to register may be due to such innocent reasons as illness, ignorance, or inability to get to a local board" (A. 306). So, too, there may be a lawful possessor of firearms or of marihuana.* This does not preclude application of the constitutional privilege to the statute at bar. The Fifth Amendment applies, as here, where the status disclosed as a result of the subsequent registration is "presumptively" indicative of guilt or *prima facie* on the issue (*Russell* v. *U. S.,* 306 F. 2d 402, 411 [9th Cir. 1962]; cited with approval by this Court in

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* See 26 U.S.C. §§ 4741-4752 and 4771-4775; *U. S.* v. *Sanchez,* 340 U. S. 42 (1950).

Haynes, supra). Similarly, the Court held in *Albertson, supra,* that it is sufficient if the information called for by the registration forms "might be used as evidence in or at least supply investigatory leads to a criminal prosecution" (382 U. S. at p. 78).

We hardly need remind the Court, moreover, that the protection of the Fifth Amendment extends to the innocent as well as the guilty (*Grunewald* v. *U. S.*, 353 U. S. 391 [1957]). Here the delinquent registrant would be faced with the burden of showing he had been ill or ignorant, for he is presumptively guilty of an act of omission.

Under the decision of the Court below a person *must* first subject himself to prosecution under his continuing duty in order to invoke the Fifth Amendment. The protection of the Fifth Amendment, we submit, cannot be so circumscribed.

The Court below while "conced[ing] that doing so might well focus unwanted attention" on the delinquent registrant, maintained that "it may be possible for a young man to register late without giving the incriminatory information, cf. *United States* v. *Sullivan,* 274 U. S. 259 (1927)" (A. 306). We assume the Court of Appeals had in mind the appearance of the young man at the draft board, and his invocation of the Fifth Amendment in response to certain questions which he is required to answer, such as the date of his birth.

In the first place, the appearance of the young man at the draft board without giving the required information would not serve to qualify him as having submitted to registration in accordance with the prevailing case law. (See e.g., *Michener* v. *U. S.*, 184 F. 2d 712 [10th Cir. 1950]; see also *Cannon* v. *U. S.*, 181 F. 2d 354 [9th Cir. 1950]; *U. S.* v. *Henderson,* 180 F. 2d 711 [7th Cir. 1950]; *Richter* v. *U. S.*, 181 F. 2d 591 [9th Cir. 1950]).

Second, such a procedure would serve to emasculate the constitutional provision. Invocation of the Fifth

Amendment under such circumstances would be an unmitigated admission of criminal culpability. As the Court stated in *Marchetti, supra,* "to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it' " (390 U. S. at p. 50).

Appearance at the draft board under the circumstances here projected, would require invocation of the Fifth Amendment even as to divulgence of the defendant's name (cf. *Kaohelaulii* v. *U. S.,* 389 F. 2d 495 [9th Cir. 1968]).

In *Kaohelaulii,* the defendant reached the age of eighteen on January 28, 1956. He did not register for the draft, however, until eight years later, on October 15, 1964. Immediately after his tardy registration, he was interviewed by an agent of the FBI and thereafter indicted and convicted for having failed to register for the draft on his eighteenth birthday or thereafter until his appearance at the board to do so on October 15, 1964 (389 F. 2d at p. 496).

Third, the very refusal to answer questions on the form, such as those relating to age, make him immediately susceptible to prosecution. (cf. *Albertson, supra.*)

Fourth, "[B]arring" the use of any "possibly incriminating information in any subsequent prosecution," as the Court of Appeals further suggested (A. 306), adopting Judge Dooling's reasoning, would not satisfy the mandate of the Constitution. The Court of Appeals, indeed, acknowledged that Judge Dooling's reasoning was before its rejection by this Court in the cases cited above (A. 306).

So, too, the balancing of constitutional interests alluded to by the Court of Appeals in its opinion (A. 305, 307-308), cannot further serve to preclude application of the Fifth Amendment. True, the Government is constitutionally authorized to raise an army. Self-registration—*to the extent that it will involve incriminatory admissions*—however, is not necessary to serve the legitimate governmental purpose. Alternative procedures for securing the necessary infor-

mation could well be utilized without impinging upon the rights guaranteed by the Fifth Amendment. Such was the express reasoning of this Court in *Marchetti* and *Haynes, supra,* where it was stated in relevant part that the Court was "fully cognizant of the Treasury's need for accurate and timely information, but other methods, entirely consistent with constitutional limitations, exist by which such information may be obtained" (*Haynes,* 390 U. S. at p. 98; see also *Marchetti,* 390 at U. S. at p. 60).

The sources for securing such information and procedures satisfying the need of the Government for information are available without compelling the defendant to provide the information and inculpate himself. For example, municipal Boards of Health (birth certificates) or Boards of Education (school records) could be required to file duplicate copies of their records with the appropriate Federal authorities and thus preserve the integrity of the Fifth Amendment.

The now accepted safety value of the immunity statute might also be utilized. It would be a simple matter for Congress to grant immunity from prosecution to those questioned and required to divulge information in connection with registration. (See *Brown* v. *Walker,* 161 U. S. 591 [1896]; *Ullman* v. *U. S.,* 350 U. S. 422 [1956]). Under such circumstances, one who failed to register on his 18th birthday might, if Congress so dictated, be subjected to the continuing duty to register. He could not then avail himself of the protection of the Fifth Amendment for failure to do so since his own statements could not be used.*

* In terms of practical effect, moreover, the use of an immunity provision would serve a salutary purpose. A young man at the age of 18, impressionable and immature in many ways, may have been impelled for misguided reasons to breach his duty of registration. In later years, he may well recognize the folly of his ways. However, without the protection of an immunity statute, he is afraid to register for fear that he will be prosecuted for previously failing to do so.

(*footnote continued on following page*)

Under the circumstances, the indictment should have been dismissed (*U. S.* v. *Covington*, 395 U. S. 57 [1969]). The Government cannot have its cake and eat it. If there is no continuing duty, the statute of limitations has run. If the Government insists that the statute has not run because of a continuing *duty*, the compulsion inherent in that *duty* violates the Fifth Amendment privilege.

POINT III

The petitioner was entitled under the First Amendment to have the jury pass on the sincerity of his conscientious beliefs which prevented him from registering.

The jury was not permitted to pass upon the petitioner's beliefs that he was a religious conscientious objector. He requested the following charge to the jury, which was denied by the trial court:

> "15. If you find from the testimony in this case that the defendant held a conscientious and religious belief that the act of registration was only another extension of war, violence and legalized killing, and if you believe that the defendant's failure to register

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(*footnote continued from previous page*)

The thrust of an immunity statute would not result in the delinquent registrant being set free. He would be inducted into the Army, if his classification warranted it. He would be free only from *prosecution* for registering late, not from Army service. This would probably encourage delinquent registrants to register. The immunity would, of course, not apply if the non-registrant was apprehended for failure to register by other than self-incriminatory means.

Finally, "[t]o hold that since the defendant made a choice to commit the primary offense the privilege is lost would be to abolish the privilege in one of its central applications, to abolish it in cases in which it has always historically applied, to defeat its very purpose" (Mansfield, 1966, Supreme Court Review, *The Albertson Case; Conflict Betwen the Privilege Against Self-incrimination and the Government's Need for Information*, 103, 130-131).

> arose from such belief, then you must find the defendant not guilty." (A. 50)*

In its main charge the Court stated:

> "* * * and if * * * he nevertheless chose to disregard the law and abide by what he believed to be a higher moral principle, his reason, his motive for failure to register under those circumstances, is not an answer to this charge." (A. 286)

We maintain that this was constitutional error and that the Court should hold that the First Amendment's guaranty of freedom of conscience bars the conviction of one who failed to register on the grounds of religious conscientious belief sincerely held; that, at the very least, he is entitled to have a jury pass on the issue.

This case does not involve selective conscientious objection to a particular war. Nor does it involve a nonreligious conscientious objection.

The "free exercise" clause of the First Amendment applies to the principled religious objector whose principles refuse to permit him to register for selective service because he believes the registration process to be part of the process of killing. If he sincerely believes this, the Government must be careful to avoid suppression of these beliefs. It should not put him to the cruel choice of surrendering his beliefs to the will of the State or of becoming subject to prosecution without the right to interpose a defense based upon his religious beliefs.

Petitioner in the case at bar testified that his religious beliefs would not permit him to participate in the act of registration (A. 177-8; p. 6, *supra*). The sincerity of his beliefs could not be tested except in the forum of his crim-

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* See also Request to Charge No. 17 (A. 50). Other instructions were requested as to the sincerity of petitioner's beliefs and also denied (Requests to Charge No. 4 and No. 5 [A. 48-49]).

inal trial. But in that trial the jury was not permitted to pass upon his defense based upon his religious beliefs. Petitioner was thus convicted without any tribunal passing upon the sincerity of his beliefs. We urge that, in the circumstances, this constitutes a violation of the "free exercise" clause of the First Amendment.

Chief Justice Hughes dissenting in *U. S.* v. *MacIntosh*, 283 U. S. 605, 633-4 (1931) (joined by Justices Holmes, Brandeis and Stone), maintained that objection to conscription as a matter of conscience was protected by the First Amendment. He wrote in relevant part as follows (283 U. S .at pp. 633-4):

> "I agree with the statement in the opinion of the Circuit Court of Appeals in the present case that 'This Federal legislation is indicative of the actual operation *of the principles of the Constitution*, that a person with conscientious or religious scruples need not bear arms, although as a member of society, he may be obliged to render services of a non-combatant nature.'" (Emphasis supplied)

This Court in *Girouard* v. *U. S.*, 328 U. S. 61 (1946), overruled the *MacIntosh* decision, *supra*, as well as *U. S.* v. *Schwimmer*, 279 U. S. 644 (1929), and while basing its decision on a construction of the statute, stated that "freedom of religion *guaranteed by the First Amendment* is the product of that struggle," referring to conscientious objection to bearing arms (emphasis supplied).

We respectfully submit that the ambit of protection constitutionally afforded one's religious beliefs cannot be limited to induction and actual service in the Armed Forces alone; but where warranted by the genuine belief of the individual must also cover the registration requirements of the draft law. The test should be the sincerity of the individual's view. The Courts of Appeal, still following the majority in *MacIntosh*, have held that the First Amendment does not protect conscientious objectors from bearing arms or registration for the draft. (See, e.g.,

Richter v. *U. S.*, 181 F. 2d 591 [9th Cir. 1950]; *Michener* v. *U. S.*, 184 F. 2d 712 [10th Cir. 1950]; *U. S.* v. *Kime*, 188 F. 2d 677 [7th Cir. 1951]; *U. S.* v. *Kissinger*, 250 F. 2d 940 [3rd Cir. 1958]; *Etcheverry* v. *U. S.*, 320 F. 2d 873 [9th Cir. 1963]). We submit that in so doing the Courts of Appeal have failed to give due effect to the import of *Girouard* and *Sherbert* v. *Verner*, *supra*, 374 U. S. 398 (1963).

The Court of Appeals below, indeed, recognized that "a proper test of a civilized society is the solicitude with which it treats its principled dissenters", and that "in theory the sincerity of one who claims that his conscientious beliefs prevented him even from registering could be tested by the trier of fact in a criminal trial" (A. 308). But it held that "under present doctrine requiring them to register for eventual assignment to non-military alternative service is constitutional" and "the present procedures of administrative decision and judicial review do not constitute an infringement of the First Amendment" (A. 308-309).

The Court of Appeals in the instant case cited no precedent for its view, but indicated that *U. S.* v. *Nugent*, 346 U. S. 1 (1953), "emphasized the constitutionality of the statutory treatment afforded conscientious objectors, which required registration, then investigation of the sincerity of alleged religious beliefs and, finally, assignment to non-military alternative service." (A. 308.) We submit that *Nugent* merely was "concerned with the procedure, established by regulation and practice, which is followed when a conscientious objector's appeal is referred to the Department of Justice" (346 U. S. at p. 4). This Court there upheld the procedure against a claim that failure to show the petitioner the FBI reports was a violation of due process.

The *Nugent* decision does not cover the situation where a conscientious objector truly believes that adherence *to the registration system itself* is contrary to his fundamental beliefs.

If a conscientious objector fails to register *because* of his beliefs, there is no tribunal that can pass upon the validity of such beliefs other than the trial jury when he is prosecuted. To take away from the trial jury the right to determine the bona fides of his conscientious beliefs is to invade that field of conscience which this Court has recognized in the case of other principled dissenters.

The Court of Appeals for the Second Circuit itself recognized as late as 1964 that the question was still open "whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress". (*U. S.* v. *Seeger*, 326 F. 2d 846 [2d Cir. 1964].) This Court construed the Act of Congress in *Seeger* so as to avoid passing upon the constitutional issue. In the instant case there is no statute that can be construed in such manner as to avoid the constitutional issue (except for the Statute of Limitations point).

The objection to *registration* for conscription as an integral part of the process of war itself is a matter of religious principle to some. Mr. Justice Brennan, concurring in *Abington School District* v. *Schempp*, 374 U. S. 203, 250 (1963) said:

> "But we must not confuse the issue of governmental power to regulate or prohibit conduct *motivated by religious beliefs* with the quite different problem of governmental authority to compel behavior *offensive to religious principles.*"

The cases in which dicta appears to have given support to the theory that religious conscientious objection is not protected by the First Amendment are cases where a privilege was sought, the attainment of which was completely voluntary on the part of the individual concerned. Thus, in *Hamilton* v. *Regents*, 293 U. S. 245 (1934), attendance at the University was voluntary and if a student was opposed to military training he was not compelled to attend. In

In re Summers, 325 U. S. 561, 572 (1945), the 5 to 4 decision involved the privilege of practicing law. Even the earlier cases of *Schwimmer and MacIntosh*, now overruled, dealt with the privilege to become naturalized.

The distinction was explained by Mr. Justice Brennan in the *Abington School District* case, *supra*, 374 U. S. 203 at pp. 250-53. Contrast the ruling in *West Virginia Board of Education* v. *Barnett*, 319 U. S. 624 (1943), where the flag salute requirement was held unconstitutional. There school attendance was compulsory. There is nothing more compulsory than conscription, and the inevitable impingement on the religious liberty protected by the First Amendment does not involve the attainment of a privilege which is volitional on the part of the seeker of the privilege. In *Sherbert* v. *Verner*, *supra*, Mrs. Sherbert was not required to violate her faith; she was merely denied a benefit if she failed to do so. The conscientious objector would be *compelled* to act contrary to his religious belief. The mandate is specific: Give up your religious belief that registration is part of a total process that is contrary to your religious belief or go to jail.

It can hardly be said that religious conscientious objection was deliberately excluded from First Amendment protection, since there was no Federal conscription when the Bill of Rights was enacted. Since the First Amendment was then believed to be a limitation only on Federal power, the occasion for determining the constitutional protection of religious conscientious objection against the Federal Government did not arise. There was no Federal conscription until 1863; before that the primary responsibility for the Army was rested in the States (See, Dumbauld, *The Bill of Rights and What it Means Today* (1957), 19, 23-40; 11 Arizona L. Rev. 249, 262-4 and Footnote 63). The muse of history wears variegated colors and in the light of modern times, sometimes shifts its hues. Just as "separate but equal" was stricken by this Court despite

years of adherence, the conception of Congressional grace as the foundation of conscientious objection no longer accords with modern views of the "free exercise" clause. Not every nuance of the "free exercise" clause need have a historical basis. In the growth and complexity of our modern society adjustment of the meaning and content of the First Amendment becomes a continuing process.

Let it be conceded that the free exercise clause is subject to some governmental restraint for the public good (*Davis* v. *Beason,* 133 U. S. 333 [1890]; *Mormon Church* v. *U. S.* 136 U. S. 1 [1890]; *Jacobson* v. *Mass.,* 197 U. S. 11 [1905]; *Prince* v. *Mass.,* 321 U. S. 158 [1944]; *Cleveland* v. *U. S.* 329 U. S. 14 [1946]). But the test should be a balance between the religious rights of the individual and whether there is sufficient affirmative harm to society to make the religious activity intolerable. "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual." (*Girouard* v. *U. S. supra,* 328 U. S. at p. 68).

In the case of conscription, the number of conscientious objectors of the type here discussed is relatively small compared with the total pool of manpower available. No patriotic advocate would willingly endanger the capacity of Congress to raise armies. But the risks to the enforcement process here are minimal.

The National Advisory Commission on Selective Service reported that less than .06 per cent of the total number of registrants were classified as conscientious objectors. (*Report of the National Advisory Commission on Selective Service,* 136-45 [1967]). It may be assumed that the percentage of conscientious objectors who cannot participate in the process of registration itself is even more infinitesimal. Yet the deprivation of liberty for conscientious belief, without the benefit of defense, is a major assault upon the rights of individual conscience. It is not in

consonance with the spirit of the First Amendment to permit the imprisonment of an individual for sincerely held religious beliefs.

We recall the words of Mr. Justice Frankfurter dissenting in *Nugent* v. *U. S. supra* (346 U. S. at pp. 12-13):

> "Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake and where prison may be the alternative to an abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies."

There is no clear and present danger to the national security to permit a limited group of sincere believers to be afforded protection under the First Amendment. Nor is there a "subordinating interest which is compelling" (*Bates* v. *Little Rock,* 361 U. S. 516, 524 [1960]). The fact that Congress itself has traditionally recognized special treatment for conscientious objectors shows that exemption for conscientious objectors does not in fact substantially impair the power to raise an Army. If any liberty can be said to be as old as the Constitution itself, it is the right to refrain from participation in war on religious grounds. The right not to be compelled to commit what the individual believes to be homicide is a right of grave moral importance.*

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* It has been suggested on the basis of the historical background of the Bill of Rights that the right of the conscientious objector to be exempt from military service is constitutionally protected by the Ninth Amendment as well as the First (see 11 Arizona L. Rev. 249 [1969]; *Griswold* v. *Connecticut,* 381 U. S. 479 [1965], and the concurring opinion of Mr. Justice Goldberg).

It may be argued that the registration process itself is essential for the Government regulation of manpower. As we have pointed out in Point II, *supra*, however, the Government has the means to obtain the names and addresses of any age class by providing that the Board of Health records and school registration records be turned over to the Selective Service System. There is no requirement for a citizen to register for jury duty, for example, but the administrative arms of the Courts are able to find the citizen for jury duty when they want him. While all these considerations require a delicate balancing of interests, we believe that the risk of having insincere persons refuse to register and thus entirely evade detection is minimal. For there is always the danger of prosecution and conviction. Counter-balancing this inconvenience to the Government is the importance to be assigned to an individual's conscience.

As this Court said in *Sherbert* v. *Verner, supra* (374 U. S. at pp. 406-7):

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' . . . [I]t would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."

And as Chief Justice Hughes said in memorable words, dissenting in *U. S.* v. *Macintosh, supra*:

> "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." (283 U. S. at 633-4.)

Under the doctrine laid down by this Court in *Sherbert* v. *Verner, supra*, the Government cannot meet the strin-

gent test of demonstrating "that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." The moral harm inflicted upon society itself by brutally repressing matters of conscience is a basic consideration. The minimal effect upon the process of raising an Army on the other hand makes it clear, under the doctrine of *Sherbert* v. *Verner*, that the accommodation of public need and private conscience can be made without depriving the individual dissenter of his rights.

As to the balancing of interests, *United States* v. *Robel*, 389 U. S. 258, 264-66 (1957), holding a statute to be in violation of the First Amendment right of association which made it unlawful for a member of a communist-action organization to engage in any employment in a defense facility points the way. The Court said (389 U. S. at p. 264):

> "Yet, this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."

The facts bearing upon the sincerity of petitioner's views, grounded in family tradition, upbringing and independent pursuit of pacifism from the age of eleven—highlighted by his anti-war valedictory address at the age of fourteen—were amply demonstrated during the course of

the trial below. At the very least, we submit, petitioner was entitled to have the jury consider the issue under a proper charge.

This entire theory of petitioner's case, as well as the specific requests to charge on the issue, were rejected by the court below (See *e.g.*, A. 286, 134-36, 139, 154, 267, 271) —the court taking the view, contrary to *Girouard* and the *Macintosh dissent*, that obedience to a higher principle, grounded in conscientious and religious belief, did not constitute a defense to the crime.

It is respectfully submitted that this was constitutional error and that this Court should so declare, accommodating the matter within the scope of the First Amendment in accordance with the views of this Court, expressed in *Girouard* and the dissent in *Macintosh* as well as in *Sherbert* v. *Verner*. A constitutional right requires a forum in which such constitutional right can be tested by judicial process (See *Crowell* v. *Benson*, 285 U. S. 22 [1932]). In the case at bar, assuming the integrity of petitioner's position that he could not conscientiously participate in the act of registration, there is no tribunal competent fully to adjudicate his claim except a jury in the Federal Court when he is prosecuted.

If it be held that the recognition of conscientious objection is a matter of grace on the part of Congress, then Congress in providing for the type of relief discussed in *Nugent* v. *U. S.*, 346 U. S. 1 (1953), is discriminating between two types of conscientious objectors, each of whom may sincerely hold his beliefs as a matter of conscience. The first objector is the person who sees no conflict with his conscience in *registering* under the Selective Service System of conscription and asserting his status as conscientious objector as a part of that process. The other type of conscientious objector, whose beliefs are

as sincerely felt, is the man, like Toussie, who cannot bring himself, as a matter of religious conscience, to participate in the process itself because its end result is the killing of human beings. In either case, if the theory of conscientious objection is accepted, the right to assert it must be preserved. Otherwise, there is an obvious discrimination between the two types of persons holding the same beliefs, based on the same religious training. Since the conscientious objector is given the opportunity to support his conscientious beliefs, which, if accepted, provide for noncombatant status or exemption, by the same token, the non-registering conscientious objector who fails to register out of the same conscientious beliefs should be afforded a forum to determine the sincerity of his beliefs. In the latter case, there is no forum possible except the jury determining his guilt or innocence upon his prosecution for the crime involved in his failure to register.

The implicit discrimination here involved does not mandate a declaration that the procedures found valid in *Nugent* would, therefore, have to be found invalid, but rather that the grant of review by Congress afforded to one type of objector should be construed so as not to involve discrimination against another type of objector. To hold that the procedure in *Nugent* is the *only* procedure would be to create an unconstitutional discrimination. This is avoided by permitting the jury—the only tribunal that can ever take cognizance of the matter—to pass upon the sincerity of the defendant's beliefs. The second type of objector is forced to choose between abandoning his beliefs as to the registration process and obtaining a hearing on his religious beliefs. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would imprisonment without a right to defend. The Fifth Amendment, within its due process clause does, in fact, include a prohibition against discrimination. (See *Bolling* v. *Sharpe*, 347 U. S. 497, 499

[1954]; *Schneider* v. *Rusk*, 377 U. S. 163, 168 [1964]; *Shapiro* v. *Tompson*, 394 U. S. 618, 641-2 [1969]; *Sherbert* v. *Verner*, 374 U. S. 398, 406 [1962].)

Under *Sherbert* v. *Verner*, *supra*, the First Amendment also may well now include a prohibition against discrimination.

As we have indicated, we believe that the discrimination against the conscientious objector who cannot, in good conscience, participate in the act of registration itself is violative of the "free exercise" clause of the First Amendment. We respectfully suggest that *Sherbert* v. *Verner* and the Fifth Amendment cases cited, *supra*, point the way to such a constitutional determination even without a holding that exemption for religious reasons is itself an imbedded constitutional right.

Even if exemption from military duty be held to be a privilege and not a constitutional right, discrimination among various religious dissenters is prohibited by the "free" exercise clause of the First Amendment (*Sherbert* v. *Verner*, *supra*). As the Court stated in *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969):

> "The Constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right'. See *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963)."

This was also suggested by the Court of Appeals for the Second Circuit itself when in *Seeger*, *supra*, Judge Kaufman wrote (326 F. 2d 846, p. 851):

> "It could hardly be argued, for example, that the authority of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination."

This Court has, moreover, recognized the doctrine that there is no legislative power to grant a privilege on unconstitutional conditions. A discriminatory denial of a tax exemption for engagng in speech is a limitation on free speech. (*Speiser* v. *Randall*, 357 U. S. 513 [1958]). In that case the Court held that the burden of showing that petitioners engaged in criminal speech was upon the State and not upon the petitioner. In the case at bar, the "privilege" of exemption is conditioned on a violation of the petitioner's religious conscience. The conscription scheme in practice goes further than a mere shifting of the burden of proof to the defendant. As construed by the Courts below it stripped the petitioner of any defense at all.

A citizen who refuses to register for the draft acts at his peril, since the jury may readily find that the alleged conscientious beliefs which impelled his dereliction were not sincere. It is submitted, however, that the First Amendment, at the very least, consistent with the pronouncements of this Court in *Girouard* and the *Macintosh* dissent as well as *Sherbert* v. *Verner*, *supra*, guarantees to him the right to have the jury pass on the issue when he is on trial for his liberty.

CONCLUSION

It is respectfully prayed that the judgment be reversed and the indictment dismissed; or, in the alternative, that the judgment be reversed and the cause remanded for a new trial.

Dated: New York, New York, December 3, 1969.

Respectfully submitted,

MURRAY I. GURFEIN,
Attorney for Petitioner.

JACOB W. HELLER,
Of Counsel.

APPENDIX

Appendix to Brief

Constitutional Provisions, Statutes and Regulations.

CONSTITUTION

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATUTES

Title 50 U.S.C. App.:

§ 453. Registration

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], it shall be the duty of every male citizen of the United States, and

every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

June 24, 1948, c. 625, Title I, § 3, 62 Stat. 605; June 19, 1951, c. 144, Title I, § 1(c), 65 Stat. 76.

§ 454. Persons liable for training and service

(a) Age limits; training in National Security Training Corps; physical and mental fitness; adequate training facilities; assignment to stations and units; training period; medical specialist categories

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States; *Provided,* That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces; *Provided further, That, notwithstanding any other provision of law, any*

*registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted;** *Provided further,* That any male alien who is between the ages of 18 years and 6 months and 26 years, at the time fixed for registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of ths Appendix], who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title [said sections] if, prior to his induction into the Armed Forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title [said sections] (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

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* Italicized portion added in June, 1967 (81 Stat. 100).

§ 462. Offenses and penalties

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classifications, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant

thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on convicition, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts martial under laws in force prior to the enactment of this to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Title 18 U.S.C.

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. As amended Sept. 1, 1964, c. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145, renumbered Sept. 26, 1961, Pub. L. 87-299, § 1, 75 Stat. 648.

PRESIDENTIAL PROCLAMATIONS

Proclamation No. 2799

July 20, 1948, 13 F. R. 4173, 62 Stat. 1531

REGISTRATION

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by title I of the Selective Service Act of 1948 [sections 451-470 of the Appendix], do proclaim the following:

1. The registration of male citizens of the United States and other male persons residing in the United States who shall have attained the eighteenth anniversary of the day of their birth and who shall have not attained the twenty-sixth anniversary of the day of their birth shall take place in the several States of the United States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands between the hours of 8:00 A.M. and 5:00 P.M. on the day or days hereinafter designated for their registration, as follows:

(a) Persons born in the year 1922 after August 30, 1922, shall be registered on Monday, the 30th day of August, 1948.

(b) Persons born in the year 1923 shall be registered on Tuesday, the 31st day of August, 1948, or on Wednesday, the 1st day of September, 1948.

(c) Persons born in the year 1924 shall be registered on Thursday, the 2nd day of September, 1948, or on Friday, the 3rd day of September, 1948.

(d) Persons born in the year 1925 shall be registered on Saturday, the 4th day of September, 1948, or on Tuesday, the 7th day of September, 1948.

(e) Persons born in the year 1926 shall be registered on Wednesday, the 8th day of September, 1948, or on Thursday, the 9th day of September, 1948.

(f) Persons born in the year 1927 shall be registered on Friday, the 10th day of September, 1948, or on Saturday, the 11th day of September, 1948.

(g) Persons born in the year 1928 shall be registered on Monday, the 13th day of September, 1948, or on Tuesday, the 14th day of September, 1948.

(h) Persons born in the year 1929 shall be registered on Wednesday, the 15th day of September, 1948, or on Thursday, the 16th day of September, 1948.

(i) Persons born in the year 1930 before September 19, 1930, shall be registered on Friday, the 17th day of September, 1948, or on Saturday, the 18th day of September, 1948.

(j) Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter.

2. (a) Every male citizen of the United States and every other male person residing in the United States other than persons excepted by section 6(a) of title I of the Selective Service Act of 1948 [section 456(a) of this Appendix], who is within any of the several States of the United States, the District of Columbia, the Territoy of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands and who shall have attained the eighteenth anniversary of the day of his birth and who shall have not attained the twenty-sixth anniversay of the day of his birth on the day or any of the days fixed herein for his registration is required to and shall on that day or any of those days present him-

self for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

(b) A person subject to registration may register after the day or days fixed for registration in case he is prevented from registering on that day or any of those days by circumstances beyond his control or because he is not present in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on that day or any of those days. If he is not in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed for registration but subsequently enters any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, he shall within five days after such entrance present himself for and submit to registration before a duly designated registration official or selective service local board. If he is in any of the several States of the United States, the District of Columbia, the Territoy of Alaska, the Teritoy of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed for registration but because of circumstances beyond his control is unable to present himself for and submit to registration on that day or any of those days he shall do so as soon as possible after the cause for such inability ceases to exist.

3. Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

4. I call upon the Governors of each of the several States, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands and the Board of Commissioners of the District of Columbia, and all officers and agents of the United States and all officers and agents of the several States, the Territories of Alaska and Hawaii, Puerto Rico, the Virgin Islands, and the District of Columbia, and political subdivisions thereof, and all local boards which, and agents thereof who, may be appointed under the provisions of title I of the Selective Service Act of 1948, or the regulations which may be prescribed thereunder, to do and perform all acts and services necessary to accomplish effective and complete registration.

5. In order that there may be full cooperation in carrying into effect the purposes of title I of the Selective Service Act of 1948, I urge all employers and Government agencies of all kinds—Federal, State, territorial and local—to give those under their charge sufficient time in which to fulfill the obligations of registration incumbent upon them under the said Act and this proclamation.

HARRY S. TRUMAN

Proclamation No. 2942

Aug. 30, 1951, 16 F. R. 8969, 65 Stat. c35

REGISTRATION—SUPPLEMENTING PROCLAMATION No. 2799

1. The registration of male citizens of the United States who are required to register by the said Proclamation No. 2799 of July 20, 1948 [set out as a note under this section], shall continue to be accomplished in accordance with the provisions of that proclamation.

2. The registration in the several States of the United States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands of male persons who are not citizens of the United States and who are subject to registration under section 3 of title I of the Universal Military Training and Service Act, as amended [this section], shall hereafter be accomplished in accordance with paragraph numbered 3 of this proclamation.

3. (a) The registration of male persons who are not citizens of the United States who shall have attained the eighteenth anniversary of the day of their birth and who shall have not attained the twenty-sixth anniversary of the day of their birth shall take place in the several States of the United States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands between the hours of 8:00 A.M. and 5:00 P.M. on the day or days hereinafter designated for their registration as follows:

(1) Every person born on or after September 15, 1925, but not after September 14, 1933, shall be registered on Friday, the 14th day of September, 1951, or on any day within the period of six months following the day on which he entered any of the following: The continental United States, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, the Virgin Islands, and Guam.

(2) Every person born after September 14, 1933, shall be registered on the day he attains the eighteenth anniversary of the day of his birth, or within five days thereafter, or on any day within the period of six months following the day on which he entered any of the following: The continental United States, the Territory of Alaska,

the Territory of Hawaii, Puerto Rico, the Virgin Islands, and Guam.

(b) Every male person now or hereafter in the United States who is not a citizen of the United States, other than persons excepted by or pursuant to section 6(a) of title I of the Universal Military Training and Service Act, as amended [section 456(a) of this Appendix] and those previously registered pursuant to the said Proclamation No. 2799 of July 20, 1948 [set out as a note under this section], or pursuant to the said Proclamation No. 2938 of August 16, 1951 [set out as a note under this section], who is within any of the several States of the United States, the District of Columbia the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands and who shall have attained the eighteenth anniversary of the day of his birth and who shall have not attained the twenty-sixth anniversary of the day of his birth on the day or any of the days fixed herein for his registration is required to and shall on that day or any of those days present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

(c) If a person subject to registration who is not a citizen of the United States is in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed for registration but because of circumstances beyond his control is unable to present himself for and submit to registration on that day or any of those days he shall do so

as soon as possible after the cause of such inability ceases to exist. If a person subject to registration who is not a citizen of the United States is not in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed herein for the registration of a person of his age but subsequently enters any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, he shall present himself for and submit to registration before a duly designated registration official or selective service local board within the period of six months following the day on which he entered any of the following: The continental United States, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, the Virgin Islands and Guam.

(d) Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

HARRY S. TRUMAN.

REGULATIONS

Title 32 C.F.R.

§ 1611.7 Responsibility for performance of duty.

(a) Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

(b) Every person who, on the day or one of the days fixed for registration, is required to be registered is per-

sonally charged with the duty of presenting himself before the proper officials and submitting to registration.

(c) The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

(d) Persons required to present themselves for and submit to registration shall not be paid for performing such obligation nor shall they be paid travel allowances or expenses.

Part 1613—Registration Procedures

Place and Time

Sec.

1613.1 Place and time of registration.

Manner of Registration

1613.11 Interview of the registrant.
1613.12 Instructions concerning completion of registration card.
1613.13 Registrant's signature.
1613.14 Certification by registrar.
1613.16 Recalcitrants.

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Authority: The provisions of this Part 1613 issued under sec. 10, 62 Stat. 618, as amended; 50 U.S.C. App. 460.

PLACE AND TIME

§ 1613.1 Place and time of registration.

(a) Any person required to be registered may present himself for and submit to registration at any designated place of registration or at the office of any local board during the hours for registration specified in the Presidential proclamation or during the usual business hours.

(b) All persons waiting to register at any place of registration at the closing hour on the day or the last one of the days fixed for their registration by the Presidential proclamation shall be registered.

[13 F. R. 4535, Aug. 6, 1948. Redesigned at 14 F. R. 5021, Aug. 13, 1949]

MANNER OF REGISTRATION

§ 1613.11 Interview of the registrant.

(a) Every registrant before being registered shall enter his name and place of residence upon one of the numbered lines on the Tally Sheet (SSS Form No. 4). If the registrant is unable to write, the registrar shall print the registrant's name and place of residence on the Tally Sheet (SSS Form No. 4). All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) must be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card (SSS Form No. 1) except when the registrant signs the completed card.

(b) The space on the Registration Card (SSS Form No. 1) for the selective service number shall be left blank.

(c) The registrar shall obtain from the registrant and by observation of the registrant the information necessary

to complete the entries on the Registration Card (SSS Form No. 1), and shall enter the information in the proper items of the card. The registrar shall make certain that the registrant fully understands what information is required and if any information given by the registrant is not clear the registrar shall carefully explain to the registrant what information is required and request that it be furnished clearly and correctly.

[13 F. R. 4535, Aug. 6, 1948, as amended by 16 F. R. 9030, Sept. 6, 1961, 28 F. R. 7497, July 24, 1963. Redesignated at 14 F. R. 5021, Aug. 13, 1949]

§ 1613.12 Instructions concerning completion of registration card.

(a) The registrar shall take extreme care that the place of residence of the registrant is correctly entered in item 2 of the Registration Card (SSS Form No. 1). The local board having jurisdiction over the place of residence entered in item 2 of the Registration Card (SSS Form No. 1) shall always have jurisdiction over the registrant, unless otherwise directed by the Director of Selective Service. The registrar shall require the registrant to give sufficient information as to the location of the place of his residence to establish such place within the jurisdiction of a local board. The registrant shall not be permitted to give a place of residence outside of the continental United States, the State of Alaska, the State of Hawaii, Puerto Rico, the Virgin Islands, Guam, or the Canal Zone. In describing his place of residence, the registrant shall give the street number thereof, when used, and in every case he shall give the name of the town, township, village, or city, and the county and State in which it is located. No R.F.D. route number shall be

sufficient unless it is supplemented by more particular information showing where the place of residence is located on the R.F.D. route. The registrant shall be permitted to determine what place he desires to give as his residence when he is not located in the same place all of the time.

(b) The registrar shall enter the mailing address of the registrant in item 5 of the Registration Card (SSS Form No. 1) only when it is not the same as the place of residence entered in item 2. It should be made clear to the registrant that he should give as his mailing address an address normally regarded by him as a permanent address at which he would expect to receive important communications. The registrar shall advise the registrant that a correct mailing address is most important because it is the address to which all notices to the registrant will be sent, and that he must advise his local board each time there is a change in his mailing address.

(c) The registrar, in entering the date of birth of the registrant in item 3 of the Registration Card (SSS Form No. 1), shall use the name of the month or an abbreviation thereof. No numerical designation for the month shall be used.

[Amdt. 77, 23 F. R. 4000, June 24, 1958, as amended by Amdt. 84, 24 F. R. 7693, Sept. 24, 1959]

§ 1613.13 Registrant's signature.

(a) When the provisions of §§ 1613.11 and 1613.12 have been carried out, the registrar shall have the registrant verify the correctness of the enties on the Registration Card (SSS Form No. 1).

(b) The registrant shall then sign his name, exactly as he usually signs it, in the space on the Registration

Card (SSS Form No. 1) provided for his signature. If he cannot sign his name, he shall make his mark, and the registrar shall then write in after the mark the words "The mark of ....., made
(Name of registrant)
in my presence" and shall sign his own name thereunder, followed by the word "Register."

(c) If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word "Registrar" beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such registrant had signed the Registration Card (SSS Form No. 1), and such registrant shall thereby be registered.

[13 F. R. 4535, Aug. 6, 1949. Redesignated at 14 F. R. 5021, Aug. 13, 1949]

§ 1613.14 Certification by registrar.

(a) After the Registration Card (SSS Form No. 1) is signed, the registrar shall note, in the space provided therefor, the registrant's answers which he believes to be incorrect or false, if any. If he does not believe any of the registrant's answers to be incorrect or false, he shall write the word "None" in such space. It is the duty of the registrar to report on the Registration Card (SSS Form No. 1) any answers of the registrant he believes to be incorrect or false.

(b) The registrar shall then sign the certification and fill in the date of registration on the Registration Card (SSS Form No. 1). The registrar should then carefully check the completed Registration Card SSS Form No. 1)

to be sure that every question is correctly answered and that all the answers are complete and legible.

[13 F. R. 4536, Aug. 6, 1948, as amended by Amdt. 71, 23 F. R. 4600, June 24, 1958. Redesignated at 14 F. R. 5021, Aug. 13, 1949]

§ 1613.16 Recalcitrants.

If a registrant refuses to cooperate or is inclined to evade, refuses to answer, or answer falsely, his attention should be called to the penal provisions of title I of the Military Selective Service Act of 1967. If he is still refractory, witnesses should be called and, after the penalty of the law has been explained again to him in the presence and hearing of witnesses, a full opportunity should be given him to reconsider his actions and answer the questions. If he is still refractory, his name and the names of the witnesses should be noted and the case immediately reported to the United States district attorney. The registration should not be obstructed or delayed. Persons attempting to obstruct or delay it should be dealt with promptly and firmly.

[Amdt. 28, 16 F. R. 9030, Sept. 6, 1951, as amended by E. O. 11360, 32 F. R. 9787, July 4, 1967]

§ 1642.3 Compliance with procedures of this part not condition precedent to prosecution.

Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by the regulations in this part is not a condition precedent to the prosecution of any person under the provisions of section 12 of title I of the Military Selective Service Act of 1967.

[E. O. 10292, 16 F. R. 9862, Sept. 28, 1951; E. O. 11360, 32 F. R. 9788, July 4, 1967]